IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

CISCO SYSTEMS, INC.,)
Plaintiff,)
v.) C.A. No. 10-687-GMS
MOSAID TECHNOLOGIES INC., Phillip Shaer, and John Lindgren,	REDACTED PUBLIC VERSION Original Filing: August 30, 2013
Defendants.) Redacted Filing: September 6, 2013

DEFENDANTS PHILLIP SHAER AND JOHN LINDGREN'S OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS CISCO SYSTEMS, INC.'S SECOND SUPPLEMENTAL AND AMENDED COMPLAINT

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NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Cisco Systems, Inc. filed this case against Defendant MOSAID Technologies, Inc. as a patent case in 2010. In twenty counts, Cisco sought declarations of invalidity of ten patents MOSAID had acquired, and also declarations of non-infringement. Cisco alleged that those judicial declarations are "necessary" for it to know its patent rights and that there is "a substantial controversy" regarding its rights. MOSAID filed infringement counterclaims.

Cisco has now filed a Second Supplemental and Amended Complaint (hereafter "complaint") (D.I. 102). The complaint adds a civil RICO claim, a California unfair competition claim, and an unclean hands defense against MOSAID, all asserting that

It also names two new defendants,
Phillip Shaer, a resident of Canada and MOSAID's General Counsel, and John Lindgren, a
resident of Canada and MOSAID's President and CEO. (Complaint, ¶5-6 (hereafter, "¶" refers to a paragraph in the complaint)). Cisco's new RICO allegations consume most of the 85-page complaint.

The amended scheduling order provides for completion of fact discovery by December 20, 2013, expert reports and motions thereafter, and trial on November 10, 2014. By Stipulation and Order dated July 28, 2013, defendants' motions to dismiss Cisco's new claims are due August 30, 2013. This brief supports Defendants Shaer and Lindgren's motion to dismiss.

SUMMARY OF ARGUMENT

1. The claims against Shaer and Lindgren should be dismissed under Rule 12(b)(2) for lack of personal jurisdiction. The complaint acknowledges that they are residents of Canada, and does not allege that either came to Delaware to take any act. The complaint alleges that each

(¶¶149 & 153), referring to a separate suit that MOSAID filed against another company (¶145)

that has nothing to do with alleged in this case. The only other allegation is the	nat
($\P150 \& 154$). These allegations do	not
identify contacts required to support jurisdiction under the Delaware long-arm statute.	
Recognizing this, Cisco also pleads personal jurisdiction under Rule 4(k)(2), which might	permit
jurisdiction if "the defendant is not subject to jurisdiction in any state's courts of general	
jurisdiction." The complaint makes no allegation regarding that required element.	
2. Cisco's RICO claim (Count 21) should be dismissed under Rule 12(b)(6) be	ecause
it fails to adequately plead the required "pattern of racketeering activity," 18 U.S.C. § 1962	2(c),
and thus fails to state a claim upon which relief can be granted. The complaint alleges that	
subpoenaed by MOSAID in an International Trade Commi	ssion
("ITC") proceeding. (¶¶39-84).	
cannot possibly constitute a pattern of racketeering activity even if	
Cisco strains to enhance the appearance of the required "pattern" with an allegation	ı that
(¶93-138). The allegation is that	
,	

although no facts as	re alleged to show eith	er. There is no plausible leg	gal theory by which
			In any event, no pattern
of racketeering acti	vity has been adequate	ely pleaded, even if	
At mo	ost,	, and not	a RICO pattern.
3. Cisc	o's RICO claim also s	hould be dismissed under R	ule 12(b)(6) because the
complaint does not	adequately plead RIC	O standing, which requires	factual allegations sufficient
to show that the all	eged RICO predicates	caused the claimed damage	. 18 U.S.C. § 1964(c). The
damage that Cisco	claims is the cost of lit	tigation here and in the ITC.	. MOSAID is legally
entitled to engage i	n that litigation, and th	ne complaint alleges no facts	s to show that
in	creased that cost.	:	
		, which is what it has trie	d to do here.
4. Cisc	o's claim (Count 22)	under California's unfair co	mpetition law ("UCL"), Cal.
Bus. & Prof. Code	§ 17200 et seq., should	d be dismissed under Rule 1	2(b)(6) for failure to state a
claim. (a) The UC	L claim is based on all	egations	
, bars the in	position of liability w	ith respect to such conduct;	(b) if does not
apply, the UCL cla	im fails because (i) no	facts are alleged to show th	at
in the	ITC investigation		
and (ii)			
	was not wro	ngful as a matter of law; (c)	UCL liability cannot be
based on			because California does

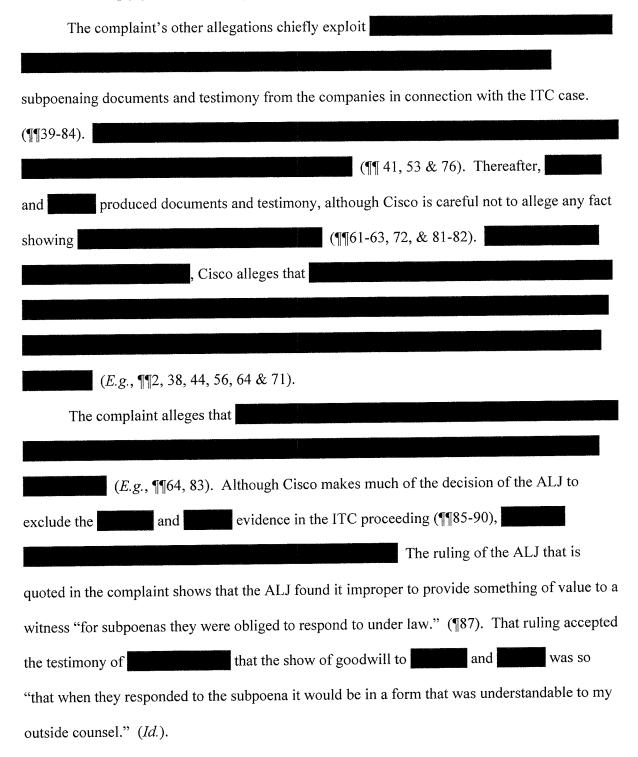
not recognize a UCL cause of action based on that any defendant obtained or possesses Cisco's money or property, its UCL restitution claim fails as a matter of law.

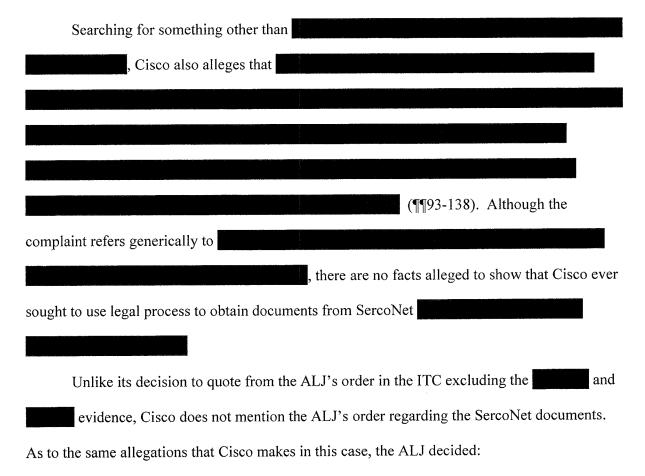
STATEMENT OF FACTS

The facts that are relevant to this Rule 12(b) motion are the new facts alleged in the complaint. Those new allegations follow two tracks.

Cisco alleges at great length that MOSAID regularly acquires patent rights and "monetizes" the rights, that it has sought to license patents to Cisco, that it uses the courts to obtain damages where patents are infringed, and that it will continue doing these things in the future. (E.g., $\P23$). Such allegations describe corporate activities that are legal and not the basis for RICO or other liability, notwithstanding that Cisco previously has filed a RICO suit as to such conduct in order to deter patent enforcement. See Cisco Sys., Inc. v. Innovatio IP Ventures, LLC, 921 F. Supp.2d 903 (N.D. III. 2013) (applying Noerr-Pennington doctrine to protect access to courts to enforce patent rights, and dismissing Cisco's RICO claims against patent enforcement company). Although Cisco alleges that MOSAID's infringement claims are baseless as to Cisco (e.g., ¶29), it was Cisco that chose to file this litigation, alleging a substantial controversy about the validity of MOSAID's patents and about whether Cisco infringed them (¶19). The complaint contains no allegation that Cisco sought to dismiss MOSAID's infringement counterclaims, and the complaint and record in this case make it plain that, in the parallel ITC action, the ITC decided to conduct an investigation of Cisco (D.I. 32) and was ready to conduct a trial to determine whether Cisco infringed MOSAID's patents (¶¶27 & 90). Cisco alleges that MOSAID "dropped" its ITC claim (¶90), but Cisco cannot dispute that the ITC case ended after the parties entered into a settlement agreement that provided for a joint motion to terminate the case and contained Cisco's release of "all claims for costs and fees

incurred in litigating the ITC investigation." (Inv. No. 337-TA-778, Order No. 47 at 1 & Attachment A, ¶3) (D.I. 60, Ex. A, ¶3).





Regarding the issue of spoliation, the Administrative Law Judge is not persuaded that SercoNet Ltd.'s ("SercoNet") documents were not available to Cisco, even though SercoNet was located in Israel. Cisco did not attempt to obtain SercoNet's documents through the means available to it, saying in essence, that once it had identified that it needed SercoNet's documents it would be too time consuming to get them. ... Because Cisco failed to use means of discovery available to it, the Administrative Law Judge is not persuaded that Cisco has been placed in an unfair position (by MOSAID) or that it has been in some way prejudiced.

(Inv. No. 337-TA-778, Order No. 22 (Feb. 16, 2012) at 2-3).

Moreover, the docket in this case reveals that Cisco only recently has sought permission to use the Hague Convention to obtain documents from SercoNet. (D.I. 90). In its motion, Cisco acknowledged that "[i]ssuance of the Letters of Request under the Hague Evidence Convention is a proper method for requesting documents and testimony of persons and entities residing

abroad." (*Id.* at 1). Thereafter, SercoNet has advised that it has thousands of responsive documents and asked Cisco to pay the costs of providing the documents. (D.I. 117 at 2).

From these Cisco has claimed as damages the cost of litigating here and in the ITC. (¶305-307). The complaint does not allege facts showing that could have caused those damages.

More specifically, the complaint does not allege facts showing that , and pleads as damages only the cost of litigating its patent disputes with MOSAID.

Finally, to give maximum deterrent effect to its effort to turn a patent case into a RICO case, Cisco adds as defendants MOSAID's General Counsel, Phillip Shaer, and MOSAID's President and CEO, John Lindgren. (¶5-6 & 148-155). Both are Canadian residents. (*Id.* & ¶4). The complaint does not allege that Shaer or Lindgren did anything in Delaware.

ARGUMENT

I. PERSONAL JURISDICTION DOES NOT EXIST OVER DEFENDANTS SHAER AND LINDGREN.

On a motion to dismiss under Rule 12(b)(2) for lack of personal jurisdiction, "the plaintiff bears the burden of establishing, with reasonable particularity, that sufficient minimum contacts have occurred between the defendant and the forum to support jurisdiction." *Registered Agents, Ltd. v. Registered Agent, Inc.*, 880 F. Supp. 2d 541, 544 (D. Del. 2012); *accord Mellon Bank (East) PSFS, N.A. v. DiVeronica Bros., Inc.*, 983 F.2d 551, 554 (3d Cir. 1993).

A. The Delaware Long-Arm Statute Does Not Authorize Personal Jurisdiction.

Cisco invokes (¶¶148 & 152) jurisdiction under the Delaware long-arm statute, 10 Del.

C. § 3104(c), but alleges only two specific facts in support (¶¶149-150 & 153-154).

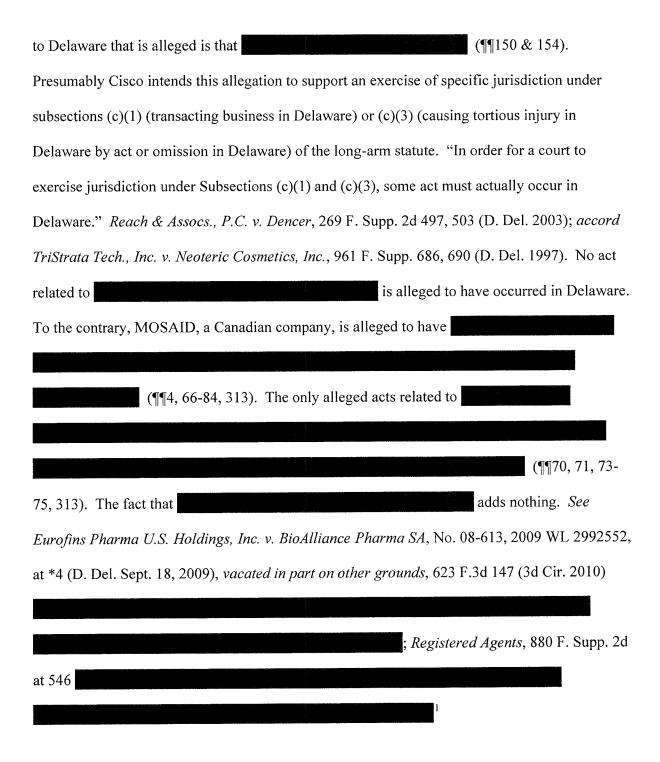
The first is that Shaer and Lindgren

(¶¶149 & 153). Nothing further is alleged as to Shaer and Lindgren to

give that conclusory allegation any content. As to MOSAID, there *is* an allegation that the company sued ShoreTel in 2009 (¶145), but the allegation is meaningless because it is not joined to any allegation of actionable conduct with respect to the ShoreTel suit. Nor does the complaint allege that Cisco's claims arise out of the ShoreTel suit, which was settled the day after it was filed MOSAID's ShoreTel suit therefore cannot be a basis for jurisdiction over Shaer and Lindgren under the "specific jurisdiction" provisions of the long-arm statute—subsections (c)(1)-(3), (5) and (6)—which require "the plaintiff's claims [to] arise out of acts or omissions in Delaware." *Marnavi S.P.A. v. Keehan*, 900 F. Supp.2d 377, 390 (D. Del. 2012); *see BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000) ("Specific personal jurisdiction exists when the defendant has 'purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or related to those activities.") (citation omitted); *Joint Stock Society v. Heublein, Inc.*, 936 F. Supp. 177, 193-94 (D. Del. 1996) (company president's approval of suit in Delaware did not have sufficient nexus to claims to support long-arm jurisdiction).

Nor can the ShoreTel suit be the basis for "general jurisdiction" under subsection (c)(4). 10 Del. C. § 3104(c)(4) (general jurisdiction requires that the nonresident defendant "regularly does or solicits business, engages in any other persistent course of conduct in the State, or derives substantial revenue from services, or things consumed in the State"); *BP Chems.*, 229 F.3d at 259 (contacts must be "continuous and systematic"); *Liqui-Box Corp. v. Scholle Corp.*, No. 12-464, 2013 WL 3070872, at *5 (D. Del. June 17, 2013) (statute requires "general presence" in Delaware).

The only other jurisdictional allegation as to Shaer and Lindgren is that but the only relationship



¹Because the scope of jurisdiction under the long-arm statute is coterminous with federal due process protections, *see Registered Agents*, 880 F. Supp. 2d at 547, exercising personal jurisdiction over Shaer and Lindgren also would offend the Constitution.

B. Fed. R. Civ. P. 4(k)(2) Does Not Authorize Personal Jurisdiction.

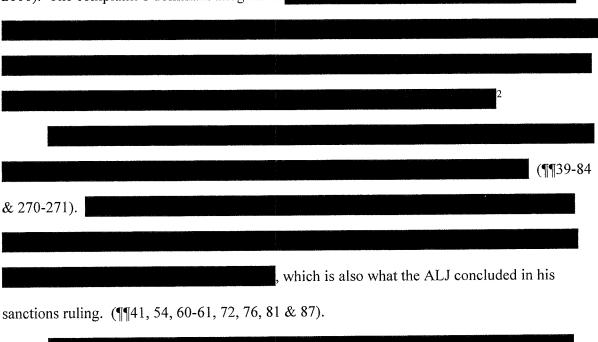
Cisco asserts Rule 4(k)(2) as an alternative basis for jurisdiction. (¶151 & 155). The rule can apply to a foreign defendant having sufficient contacts with the United States as a whole but insufficient contacts with any particular state, such that "the defendant is not subject to jurisdiction in any state's courts of general jurisdiction." Fed. R. Civ. P. 4(k)(2). The complaint contains no allegation that Shaer and Lindgren are not subject to jurisdiction in any state, even though it carefully alleges each of the other requirements laid out in Rule 4(k)(2). As plaintiff, Cisco "bears the burden of demonstrating that [the defendant] is not subject to jurisdiction in any state." *Telcordia Techs., Inc. v. Alcatel S.A.*, No. 04-874, 2005 WL 1268061, at *5 (D. Del. May 27, 2005); see CFMT, Inc. v. Steag Microtech, Inc., No. 95-442, 1997 WL 313161, at *7 (D. Del. Jan. 9, 1997), aff'd, 965 F. Supp. 561 ("plaintiffs are required to make an affirmative representation"). Rule 4(k)(2) is not an alternative source of jurisdiction simply because the Delaware long-arm statute is unavailing. Monsanto Co. v. Syngenta Seeds, Inc., 443 F. Supp. 2d 636, 647 (D. Del. 2006); see Telcordia Techs., 2005 WL 1268061, at *5.

II. THE COMPLAINT DOES NOT ALLEGE A RICO CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Cisco's RICO claim is to be determined by the facts alleged. Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Courts "peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth" and then "look for well-pled factual allegations, assume their veracity, and ... 'determine whether they plausibly give rise to an entitlement to relief." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

A. The Complaint Does Not Allege a Pattern of Racketeering Activity.

An essential element of a RICO claim is the existence of "a pattern of racketeering activity." 18 U.S.C. § 1962(c); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 362 (3d Cir. 2010). The complaint's dominant allegations

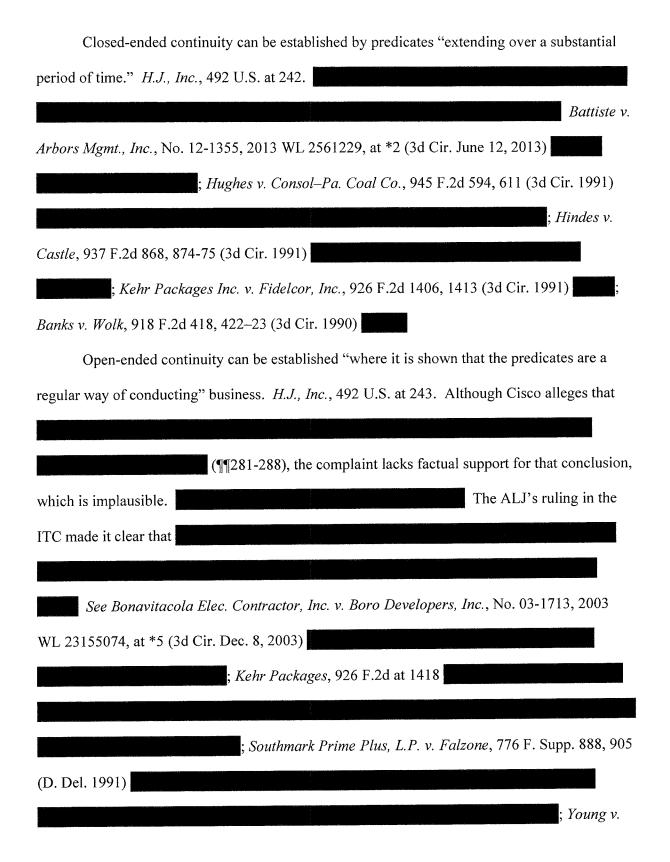


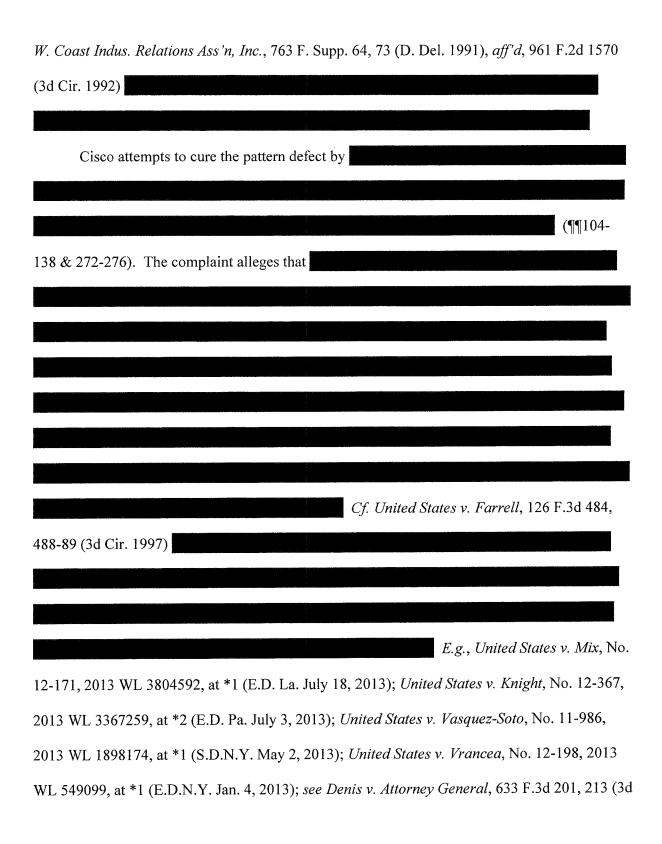
"[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related and that they amount to or pose a threat of *continued* criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis added). That can be done by proving so-called "open-ended" or "closed-ended" continuity with respect to the predicate acts. *Id.* at 242-43.

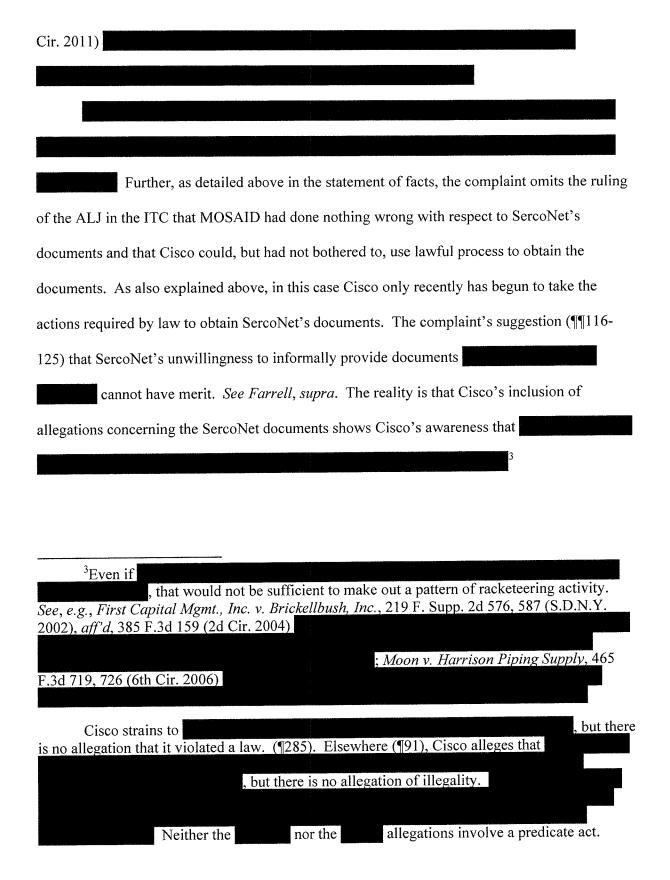
Compare

Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328, 1335 n.2 (11th Cir. 1997), with United States v. Blaszak, 349 F.3d 881, 886-887 (6th Cir. 2003). If this case were to go forward, however, Cisco would have to prove those things.

²It is assumed for present purposes that



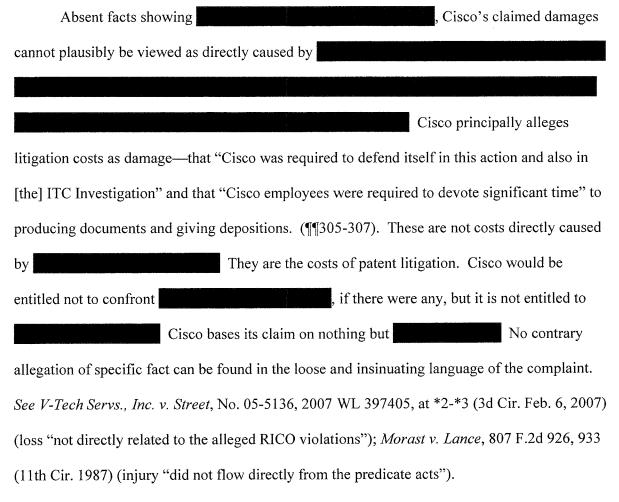




Finally, if the complaint's allegations that MOSAID's regular business is the acquisition of patents and enforcement of them in court are intended to supply the continuity required to establish a RICO pattern, the effort fails. MOSAID is entitled by the patent laws to pursue its business, and privileged by the First Amendment to invoke the assistance of the federal courts to enforce its rights. *Cisco Sys., Inc. v. Innovatio IP Ventures, LLC*, 921 F. Supp. 2d 903 (N.D. Ill. 2013) (applying *Noerr-Pennington* doctrine). Cisco actually filed this case, asserting that it presents substantial questions for judicial resolution. Cisco is entitled to litigate, and it has no call to suggest that it is improper for MOSAID to do the same.

B. Cisco Cannot Allege RICO Standing Absent Factual Allegations Showing that

Although the complaint is full of insinuations, no fact is alleged to show that Cisco surely , or that SercoNet and would have included such allegations if it were possible. Indeed, if , Cisco would have sued them, but it did not do that. SercoNet is fatal to its Cisco's failure to allege facts showing RICO claim, because to assert that claim it must have RICO standing, which requires damages directly caused by the crimes that are alleged to comprise the RICO pattern. 18 U.S.C. § 1964(c) (RICO damage must exist "by reason of" predicate act); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006) ("[T]he compensable injury flowing from a [RICO] violation ... 'necessarily is the harm caused by [the] predicate acts.'") (citation omitted). "[T]o state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense 'not only was a "but for" cause of his injury, but was the proximate cause as well." Hemi Group, LLC v. City of New York, 559 U.S. 1, 9 (2010) (citation omitted); see Longmont United Hosp. v. Saint Barnabas Corp., No. 07-3236, 2009 WL 19343, at *1 (3d Cir. Jan. 5, 2009) (applying Anza).

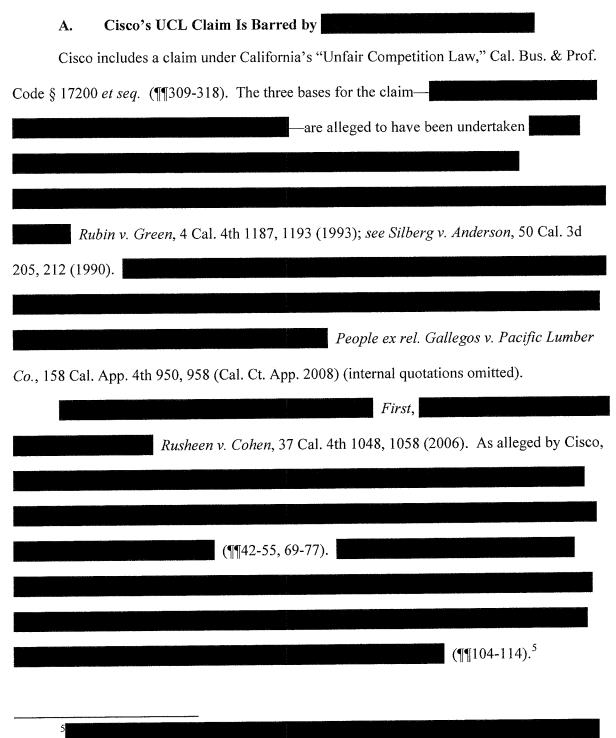


Further, as to causation of the damages Cisco alleges, Cisco was the party that filed this case, and the ITC, after receiving MOSAID's complaint, made an independent decision to investigate Cisco. In any event, MOSAID was entitled to counterclaim in this case and to ask the ITC to investigate Cisco. *Cisco Systems, Inc. v. Innovatio*, *supra* (Noerr-Pennington doctrine recognizes First Amendment right to litigate).⁴

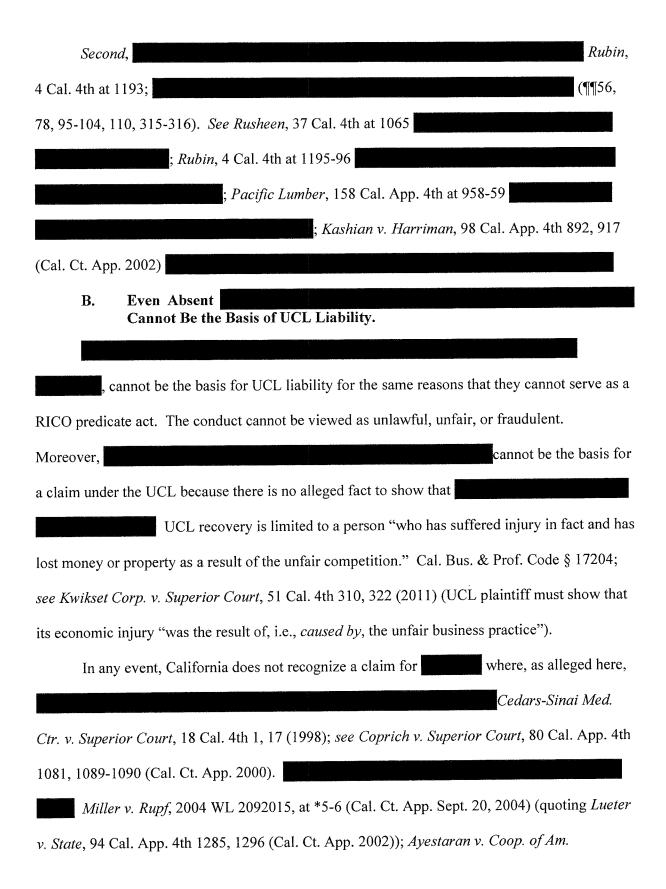
⁴Cisco also focuses on a small part of the ITC litigation cost. (¶308)

The cost of cannot be classed as damage. And the motion to exclude succeeded, saving Cisco the substantial costs of an ITC trial and depriving MOSAID of Cisco will not dispute that its ITC settlement agreement releases "any and all claims for costs and fees in litigating the ITC investigation, including but not limited to attorneys' fees, costs, and other expenses incurred ... in connection with the investigation." (No. 337-TA-778, Order No. 47, Attachment A, ¶3) (D.I. 60, Ex. A, ¶3).

III. THE COMPLAINT FAILS TO STATE AN UNFAIR COMPETITION CLAIM.



The complaint alleges no facts showing any of that. Starkey v. Covenant Care, Inc., 2004 WL 206209, at *4 (Cal. Ct. App. Feb. 4, 2004); Pladott v. Hammers, 2010 WL 3312505, at *4 (Cal. Ct. App. Aug. 24, 2010).



Physicians, Inc., 2002 WL 973202, at *6 n. 5 (Cal. Ct. App. May 13, 2002); *Starkey*, 2004 WL 206209, at *5-6 (dismissing UCL claim).

C. Cisco Has Not Stated a Claim for Restitution.

Under the UCL, a plaintiff can recover restitution only when the defendant actually acquired money or property from the plaintiff. *Kwikset Corp.*, 51 Cal. 4th at 336. The complaint does not allege that, and so its prayer for restitution should be dismissed. *Fresno Motors, LLC v. Mercedes-Benz USA, LLC*, 852 F. Supp. 2d 1280, 1316 (E.D. Cal. 2012); *Dillon v. NBCUniversal Media LLC*, No. 12-09728, 2013 WL 3581938, at *10 (C.D. Cal. June 18, 2013); *P & M Ventures Inc. v. Netherlands, Inc.*, No. 12-03859, 2012 WL 4063455, at *4 (N.D. Cal. Sept. 14, 2012).

CONCLUSION

The Court should dismiss all claims alleged against Defendants Shaer and Lindgren.

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CERTIFICATE OF SERVICE

I, Collins J. Seitz, Jr., hereby certify that on August 30, 2013, I caused *Defendants Phillip Shaer and John Lindgren's Opening Brief in Support of their Motion to Dismiss Cisco Systems, Inc.'s Second Supplemental and Amended Complaint* to be served via electronic mail upon the following individuals:

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